

Office of Chief Counsel
Internal Revenue Service
Memorandum

Number: **200814008**

Release Date: 4/4/2008

CC:PA:07:
POSTS-100035-08

Third Party Communication: None
Date of Communication: Not Applicable

UILC: 7602.00-00

date: February 29, 2008

to: Debra Holland
Director, Pre-Refund Hold Program
Attn: Dorothy Lafosse

from: Robin M. Tuczak
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(Procedure & Administration)

subject: Notice of Third-Party Contacts in Questionable Refund Program

This Chief Counsel Advice responds to your request for assistance dated December 28, 2007. This advice may not be used or cited as precedent.

ISSUES

1. Whether Wage and Investment Division employees (W&I) must provide a taxpayer advance notice of a third-party contact when contacting the taxpayer's employer to verify wage and withholding information as part of the questionable refund program.
2. If notice must be provided, how far in advance must W&I employees provide the taxpayer with notice before making the third-party contact?

CONCLUSIONS

1. Wage and Investment Division employees must provide a taxpayer advance notice of a third-party contact before contacting the taxpayer's employer to verify wage and withholding information.

2. If the notice is sent by mail, the employee should wait ten days before making a third-party contact. If the notice is delivered by hand, the employee may make third-party contacts following delivery.

FACTS

Wage and Investment employees will begin screening thousands of returns with potentially fraudulent W-2's. If the refund shown on the return is questionable, W&I will contact the identified employer to verify both wages and withholding.

LAW AND ANALYSIS

I. Advance Notice Must Be Provided Before Initiating Third-party Contacts

Generally, an employee of the Service may not contact a third-party regarding the determination or collection of a tax liability of a taxpayer without providing reasonable advance notice to the taxpayer that such contact may be made. I.R.C. § 7602(c)(1). A contact is considered a third-party contact subject to section 7602(c) if it is a communication which:

- (1) Is initiated by an IRS employee;
- (2) Is made to a person other than the taxpayer;
- (3) Is made with respect to the determination or collection of the tax liability of such taxpayer;
- (4) Discloses the identity of the taxpayer being investigated; and
- (5) Discloses the association of the IRS employee with the IRS.

Treas. Reg. § 301.7602-2(b). If W&I contacts a taxpayer's employer to verify the taxpayer's wage and withholding information, it is a third-party contact requiring notice because the contact meets all five criteria. The contact is made by an IRS employee to a person other than the taxpayer, satisfying (1) and (2). The income is being verified to determine the tax liability of a particular taxpayer, satisfying (3). The taxpayer's identity is disclosed because the IRS employee asks for the wage and withholding information of a particular taxpayer, satisfying (4). Finally, the IRS employee must reveal that he is an IRS employee to obtain the wage information, satisfying (5).

Section 7603(c)(3) provides that the notice requirements of section 7602(c)(1) shall not apply:

- (A) to any contact which the taxpayer has authorized;
- (B) if the Secretary determines for good cause shown that such notice would jeopardize collection of any tax or such notice may involve reprisal against any person; or
- (C) with respect to any pending criminal investigation.

Generally, W&I's contact to a taxpayer's employer to verify wage and withholding information does not meet any of the three exceptions provided by section 7603(c)(3). There is no indication that the Service has the taxpayer's consent to contact the taxpayer's employer, nor is there an indication that a third-party contact in this situation would jeopardize collection or invite reprisal. Thus, two of the exceptions to providing notice do not apply.¹ See I.R.C. § 7602(c)(3)(A) & (B). Though there is an exception for contacts made "with respect to any pending criminal investigation," I.R.C. § 7602(c)(3)(C), this exception does not apply either. Treasury Regulation § 301.7602-2(f)(4) clarifies this exception, stating:

. . . Section 7602(c) does not apply to contacts made during an investigation, or inquiry to determine whether to open an investigation, when the investigation or inquiry is

(A) Made against a particular, identifiable taxpayer for the primary purpose of evaluating the potential for criminal prosecution of that taxpayer; and

(B) Made by an IRS employee whose primary duties include either identifying or investigating criminal violations of the law.

In this case, if a W&I employee makes the contact, the contact is not made by an IRS employee whose primary duties include identifying or investigating criminal violations of the law. Thus, the criminal investigation exception to providing advance notice does not apply and taxpayers will need to be provided with advance notice before their employers are contacted.²

II. Timing and Procedural Issues Regarding Third-party Contact Notice

Section 7602(c) requires that the Service provide "reasonable notice in advance" to the taxpayer before making third-party contacts. Mailing Publication 1 to a taxpayer satisfies section 7602(c)'s requirement that a taxpayer be given notice before the Service makes third-party contacts. See INTERNAL REVENUE SERVICE, U.S. DEP'T OF TREASURY, PUBLICATION 1, YOUR RIGHTS AS A TAXPAYER (2005) (stating that the Service may contact third-parties as long as there is activity in the taxpayer's case). However, neither the statute nor the regulations define what advance period of time is considered reasonable. Throughout the I.R.M., the Service has taken the position that if the advance notice is mailed, the Service should wait 10 days before contacting third parties or, if the advance notice is hand delivered to the taxpayer, third-party contacts may begin immediately after delivery. See, e.g., I.R.M. 4.10.1.6.12.2.1(4)(b);

¹ Exceptions (1) and (2) may arise in certain circumstances, but will not generally apply to W&I contacts to employers to verify wage and withholding information.

² For purposes of this memo, since Treasury Regulation § 301.7602-2(f)(4)(B) makes it clear that W&I employees do not qualify for the criminal investigation exception, we do not need to reach a conclusion regarding whether the primary purpose of the program is to evaluate the potential for criminal prosecution of the taxpayer.

4.11.57.4.1(5); 4.71.1.9.2.1(3) & (4); 5.1.17.3.1(5)-(7). Consistent with Service policy, W&I should follow the same timing guidelines.

Furthermore, section 7602(c)(2) requires that the Service provide the taxpayer, periodically or upon the taxpayer's request, with a record of persons contacted with respect to the determination or collection of the taxpayer's tax liability. This record should include information that reasonably identifies the person contacted. Treas. Reg. § 301.7602-2(e)(2)(i). However, the Service need not solicit the name of the person contacted solely for purposes of the post-contact report and the report does not need to include other information such as the nature of the inquiry or the third-party's response. Id. Finally, if the Service contacts the employee of an entity, acting within the scope of their employment, it is sufficient to record the entity as the person contacted. Treas. Reg. § 301.7602-2(e)(2)(ii). Thus, if W&I contacts taxpayers' employers to verify wage and withholding information, it needs to ensure that it has the capability to create and provide post-contact reports to the taxpayer.

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Please call (202) 622-4570 if you have any further questions.